

U.S. Department of Labor

Board of Contract Appeals
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June 18, 1999

Case No.: 1997- BCA-0004

Appeal of

BRERO CONSTRUCTION, INC.

Contract No.: E-4098-3-00-82-20

RULING ON APPELLANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Statement of the Case

This proceeding involves an appeal from a contracting officer's final decision denying twenty-four change order proposals related to closeout of a contract for construction of the San Jose Job Corps Center for the U.S. Department of Labor. Under cover of a letter dated August 19, 1998, the Appellant Contractor filed a Motion To Compel Production of Documents with this Board on November 2, 1998.¹ Appellant complains (1) that the Contracting Officer ("CO") has not produced all documentation pursuant to this Board's order of August 26, 1998; (2) that the CO has not produced all documentation as agreed by the parties; (3) the CO has withheld relevant, nonprivileged documents which should have been produced based on an allegedly spurious claim of deliberative process privilege. Appellant was also frustrated by its inability to examine all of the requested documents because the Contracting Officer did not produce documents which it had failed to examine by the agreed date for disclosure. Appellant's counsel's office is in Colorado; the production was to be made, and was made in part, in Virginia. Claimant's travel schedule, once made, was allegedly not flexible, and Appellant seeks reimbursement for extra costs it incurred because of the CO's unjustified noncompliance.

The Board had issued an explicit disclosure order dated August 26, 1998, directing that,

¹The Contracting Officer's final written decision dated February 11, 1997, relates to 24 items as to which Appellant had made claims for adjustment. In the Notice of Receipt of Appeal and Prehearing Order dated June 3, 1997, the Contracting Officer was directed to compile and transmit to the Board an Appeal file consisting of "all documents pertinent to the appeal."

Complete document production shall be made by both parties including, but not limited to, all subcontractor files, all vendor files, all project records including schedule files, daily reports, filed reports, correspondence by and between the parties including the Department of Labor, its representatives or agents and any and all other entities, governmental branches, architects and engineers and/or consultants performing work or in any way associated with this project. Both parties shall produce privilege logs of any documentation withheld. Said production of documents shall be completed on or before the close of business (5 p.m., EST), November 30, 1998.

This order to produce is broad in scope, and manifestly intended to require disclosure of any and all documentation relevant to the project, except that subject to privilege, within the November 30 deadline specified for production. By agreement, the CO was to produce its documentation at the office of DMJM in Alexandria, Virginia, on October 13-16; Appellant was to produce its documentation at its counsel's offices in Colorado Springs, Colorado, on October 19-23. When the CO could not postpone the discovery process, the CO withheld five boxes of documentation. To the extent that documentation was withheld and not included in the Privilege Log by the November 30, 1998, deadline, the Contracting Officer was not in compliance with that order.

Appellant's Claim of Deficient Discovery

Appellant claims that it has incurred substantial additional costs because it could not complete discovery as planned, and seeks to obtain at government expense copies of the documentation contained in the remaining five boxes 16A, 17A, 18A, 19A, and 20A, as described with more particularity in Exhibit C to its motion. The Contracting Officer later supplemented the Privilege Log under cover of a letter dated December 4, 1998, by an additional list of documents from files relating to the project which allegedly were belatedly discovered and removed from the office of Troy Caperton, who is identified as the DMJM/HTB Project Manager responsible for assisting the Government Authorized Representative ("GAR") in the administration of the design and construction of the San Jose Job Corps Center. DMJM/HTB contracted with the Employment and Training Administration of DOL to provide engineering support and assistance to the GAR and CO. As to these documents, the CO also cited the deliberative process and other privileges as specified. The format of that list of 34 documents was similar to that of the Privilege Log filed initially, except that Caperton had apparently categorized this subset of documents by subject, such as "A+ A Claim," "Negotiations (Final)," "Counterclaim," "Complaint/Answer," "Negotiation (Troy, Ken, Erv)," "Remaining COPs 71, 200, 238, 239," "Impact/Delay," and "loose material." In its response to the CO's opposition, Appellant also contends that, because the CO has effectively admitted failing to produce these documents, the CO should be required to conduct and document an exhaustive search for project related files of any kind, reinforced by affidavits documenting the chain of custody of all documents.

In challenging the CO's invocation of the several privileges, Appellant relies in part upon this

Board's prior ruling in *Charlesgate Constr. Co.*, DOLBCA No. 96 BCA 2, 1997 DOLBCA LEXIS 2 at *7-8 (Mar. 7, 1997). Appellant contends that none of the three prerequisites for invocation of a deliberative process claim of privilege have been satisfied. First, the agency head has not made the requisite personal investigation and particularized statements identifying information allegedly subject to the privilege. Second, trial counsel lacks authority to make the claim of privilege. Third, the CO has not provided "precise and certain reasons" for maintaining the confidentiality of the requested documents.

CO's Opposition and Privilege Log – Invocation of Privilege

The CO's response to Appellant's motion includes a 99 page Privilege Log which purports to list "approximately 1,215 documents...for which the CO has asserted the deliberative process privilege." The CO asserts that only "about 144" of those documents relate to change order proposals directly involved in this proceeding. The CO also relied on the attorney-client privilege with respect to four documents and the attorney work product privilege with respect to one document listed on the Privilege Log.²

The ninety-nine page inventory comprising the CO's initial Privilege Log lists only a truncated description of each document under four headings: Date, Name, Description, Miscellaneous. Typically each such description consists only of the date, an identification of the sender and receiver under Name, the number of a change order proposal or similar identification under Description, and a one or few word indication that the document allegedly involves a recommendation, analysis of cost, suggestion for action, or similar characterization, under Miscellaneous. There is no further indication of the nature of any document. In no case has the rationale for the invocation of the privilege vis-a-vis any particular document been disclosed. There is no basis in any of the descriptions for an informed or independent evaluation of the nature of the document or its contents by the Board, or for concluding that the information in the documents listed is other than factually related as opposed to policy or legally related. There is no indication of the level of confidentiality which has attached and been preserved with respect to the particular documents listed. These descriptions are, at most, "scant" and "uninformative." *See Mobil Oil Corp. v. DOE*, F.F.D. 1 (1983).

The CO's opposition and Privilege Log is accompanied by a supplementary affidavit of Raymond Bramucci, Assistant Secretary, Employment and Training Administration, U.S. Department

²The description of the five documents in the Privilege Log reveals only, "5/28/92," "Charles D. Raymond to ETA," "Environmental Site Assessment - San Jose Job Corps Ctr.," "Attorney/Client Privilege" on p. 1; "5-28-92," "Raymond to Battle," "Job Corps: Environmental Site Assessment, San Jose Job Corps Center," "Attorney/Client Privilege"; "4-7-92," "Battle to Raymond," "Environmental Site Assessment, San Jose Job Corps Center," "Attorney/Client Privilege," on p. 67; and "11-20-97," "Troy Caperton to Frank Buckley," "Men's dorm bathrooms," "2 copies Attorney/Client Privilege + work product privilege," on p. 99. The Board recognizes that Raymond and Buckley are legal counsel. Virtually nothing is thus disclosed of the nature and substance of the communications.

of Labor. In his affidavit the Assistant Secretary has declared that he has “personally reviewed all the ETA documents for which ETA asserts the deliberative process privilege.” He has also declared that after personal consideration of the facts of this case, he has “determined that it is in the public interest not to disclose recommendations and opinions to the Contracting Officer by individuals involved in the various layers of review of the contractor’s change order proposals.” The facts he cites as considered are that only 24 of a total of approximately 240 change order proposals relating to the construction contract “are directly involved in this proceeding.” He also considers the identities of the individuals working for the Contracting Officer who make investigations, examine options, and make recommendations to the Contracting officer in accordance with established procedures and authority.

The Assistant Secretary advises that disclosure of the discourse leading to the Contracting Officer’s Final Decision would have a chilling effect on the free flow of information and discussion affecting future claims, and thus would adversely affect ETA’s decision making processes, and thus the public interest. The affidavit suggests that the availability of the Contracting Officer as a witness at hearing would allow adequate and appropriate opportunity for challenging the Contracting Officer’s Final Decision. However, it does not describe or address the character of any particular document included in the Privilege Log.

Findings of Fact, Discussion, and Conclusion of Law

Invocation of the Deliberative Process Privilege

The Board has previously identified the elements of proof which must be satisfied to establish a valid claim of privilege based upon deliberative process in *Charlesgate*. The deliberative process privilege is not absolute and is closely circumscribed. See *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff’d*, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967); *Automar IV Corp.*, DOTCAB No. 1867, 88-2 BCA ¶20,821. Any assertion of the deliberative process privilege must be made in the context of an executive privilege and must meet the formalities required for proper assertion of a common law executive privilege. See *Abramson v. U.S.*, 39 Fed. Cl. 290 (1997), citing *CACI Field Svcs. v. U.S.*, 12 Cl. Ct. 680, *aff’d* 854 F.2d 464 (Fed. Cir. 1988); *Mobil Oil Corp.* The Board must then make the final determination which documents or portions of documents withheld are privileged. See *Federal Data Corp.*, DOTCAB No. 2389, 91-3 BCA ¶24,063.

This Board is impressed by the need for full discovery in a complex, fact oriented case such as this. As Judge Leventhal observed in *Freeman v. Seligson*, 405 F.2d 1326, 1348 (D.C. Cir. 1968), “The principle favoring full access by the courts and litigants to relevant information, in the absence of strong competing considerations, is an important foundation for the achievement of justice by the courts in individual lawsuits.” In this case, as in *Charlesgate*, the Board is troubled by a refusal to disclose relevant information which suggests a search for tactical advantage in a sporting contest rather than a search for the truth, especially because the CO is obligated to assemble an Appeal File containing the documents relevant to a full presentation and soundly based decision regarding numerous contested diverse and complex factual claims.

The deliberative process privilege extends to intragovernmental documents reflecting advisory opinions, recommendations, and deliberations that comprise a part of the process by which governmental decisions and policy are formulated. *See Charlesgate Constr. Co.; Federal Data Corp.* Because the privilege is designed to promote candor in advice to public officials, it does not pertain to purely factual material which can be severed from the deliberative context. *See Centel Federal Systems, Inc. v. Dep't of the Navy*, 93-1 BCA ¶25,534; *EPA v. Mink*, 410 U.S. 73 (1973); *Federal Data Corp.* The allegedly privileged documents must address a direct part of the deliberative process insofar as it makes recommendations or expresses opinions on legal or policy matters. *See Charlesgate Constr. Co.; Walsky Constr. Co. v. U.S.*, 20 Cl. Ct. 317 (1990); *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975); *Unisys Corp. v. Dep't of Commerce*, GSBCA No. 12823-COM, 95-2 BCA ¶27,903. However, the deliberative process privilege does not apply to recommendations that the agency chooses to incorporate either expressly or by reference into its final decision. *See Unisys Corp.; U.S. West Information Systems, Inc.*, GSBCA No. 9103-P, 87-3 BCA ¶20,204. The Department bears the burden of proof that the documents withheld are protected from discovery by the deliberative process privilege. *See Walsky Constr. Co.; Federal Data Corp.* The asserted claim of privilege must specifically describe the material that is allegedly privileged, and must state the reasons for preserving the confidentiality of the requested documents. *See Charlesgate Constr. Co.; Automar IV Corp.*

Procedural Prerequisites to Invocation of Deliberative Process Privilege

At the threshold, there are three procedural requirements which must be satisfied by the government when it refuses to produce documents in discovery by invoking the deliberative process privilege. As suggested by Appellant, the agency head or a high ranking subordinate with properly delegated authority must invoke the privilege for the invocation to be valid. *See Automar IV Corp.* This Board finds that the nature of the claim validates the delegation to the Assistant Secretary, Employment and Training Administration, the authority to invoke the privilege as specified in his affidavit filed with this Board. *See Unisys Corp.* (delegation to Inspector General); *Federal Data Corp.*, 91-3 BCA ¶24,063 at 120,471 (delegation to head of subagency of cabinet department); *Texas Instruments, Inc.*, ASBCA No. 23678, 83-2 BCA ¶16,599 (delegation lower than agency general counsel impermissible.). Although trial counsel may have engineered the process by which the invocation has been effected by the Assistant Secretary, this Board does not find the delegation to be defective under applicable law. The Board accepts the sworn statement of this high ranking official that he has made the requisite personal investigation.

The authorized officer invoking the privilege, however, must state with particularity what information is subject to the privilege. *Walsky Constr. Co.; Mobil Oil Corp. v. DOE*, 102 F.R.D. 1 (N.Y.N.Y. 1983); *Automar IV Corp.* Conclusory assertions do not suffice. *See Charlesgate Constr. Co.; In re Nelson*, 131 F.R.D. 161, 165 (D. Neb. 1989); *see also Mobil Oil Corp.* The invocation of the deliberative process privilege is deemed deficient in this regard. In *Mobil*, the Energy Department provided the court with an index of documents for *in camera* review which identified the author, addressee, date, subject, the privilege claimed, and a justification such as “identifies potential causes for the fluctuations of old oil and reports on audit programs designed to detect these causes.”

The descriptions were found to be “scant” and “uninformative.” The court held that the index did not adequately demonstrate the documents’ advisory or recommendatory nature or whether they contained severable factual information. 102 F.R.D. at 8.

The information supplied in the index filed by the CO in this case is substantially less revealing than the “uninformative” descriptions provided in Mobil, and the mere conclusory and self-serving characterizations of “recommendation” or “suggests actions” are clearly insufficient to satisfy the second procedural requirement that the information to be withheld must be described with particularity. We have previously held that short document descriptions consisting of stereotyped or conclusory statements, such as “documents contain options and recommendations for the Contracting Officer’s consideration” do not satisfy the procedural requirement. *See Charlesgate Constr. Co.*; *see also Automar IV Corp.*, 88-2 BCA ¶20,821 at 105,263 (statement that documents “concern recommendations from a staff official to the Contracting Officer on courses of action to be taken” does not satisfy procedural criteria without supporting affidavit or statement of harm); *compare SCM Corp. v. United States*, 473 F.Supp. 791 (Cust. Ct. 1979); *DOE v. Crocker*, 629 F.2d 1341 (Temp. Emer. Ct. App. 1980). The unavoidable conclusion in this case is that the CO has not provided enough of a description of any of the approximately 1215 documents as to which the privilege is sought to be invoked to allow this Board to determine whether the documents do in fact contain privileged recommendations or other material not segregable from purely factual information which would not be privileged or properly withheld. Nor is the description of the documents sufficient to allow an evaluation of whether the attorney client or work product privileges might validly apply.

The authorized officer invoking the privilege must provide “precise and certain reasons” for maintaining the confidentiality of the requested documents. *See Walsky Constr. Co.*; *Mobil Oil Corp.*; *Automar IV Corp.* Such reasons must establish that the government’s decision-making process will be harmed if the requested information is disclosed. By implication the reasons given should relate to policy grounds for such nondisclosure, especially since in this case the information requested appears to relate to routine contract administration, and the requirement relates to the protection of the decision-making process, and not the government officials who participate in it. *See Walsky Constr. Co.*, 20 Cl. Ct. at 321; *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958). Notably absent from the CO’s submissions is any clear indication of what significant harm the government would suffer if the information in question were disclosed. A general assertion that the disclosure would cause a chilling effect upon the process whereby subordinates disclose facts and make recommendations to the CO in the ordinary course of contract administration is hardly persuasive. In this case, the subordinate involved may be largely responsible for, and may be principal witnesses to, the day-to-day implementation of the contract, and they may have interacted personally, not only with the CO, but with the contractor. In this instance, because the CO has relied almost exclusively on a generalized citation of a theoretical chilling effect unrelated to any particular document or other communication in the context of a routine managerial process or contract administration, the Board concludes that the CO has not established the requisite precise and certain reasons for maintaining the confidentiality of the information in question in this case.

Effect of Disclosure

The CO has claimed that disclosure of the information identified in the Privilege Log as supplemented would have a chilling effect upon the process whereby the CO's subordinates provide the CO with information and recommendations and policy choices. This contention is patently specious in the context of contract administration such as this one. Obviously, the CO cannot perform his functions without the information and recommendations which theoretically might be chilled. Rather, the prospect of disclosure in litigation, with the concomitant need to defend the efficacy of the assessments or recommendations, should have the effect of inspiring greater accuracy and thoroughness in providing the essential information and recommendations. Any omissions as well as commissions would so reflect upon the quality of the subordinates' performance that performance quality should logically be enhanced, not impaired, by anticipation of disclosure. Nor is the nature of the process involved in routine contract administration such that the prospect of disclosure might stimulate grandstanding or intimidate subordinates from playing the role of devil's advocate, for example, which might be significant concerns if high level policy formulation were involved. It may be taken as given that agency policies are developed by senior level officials, and that, in contrast, discussions between lower level contract administrators regarding routine contract operations would not, ordinarily, in the absence of a specific showing to the contrary, pertain to the formulation of agency policy which would need to be protected by invocation of the deliberative process privilege.

The advisory opinions that the deliberative process privilege is designed to protect are opinions which contain ideas and points of view on legal and policy matters, as distinguished from factual matters, which to all appearances, are involved here. *See Ingalls Shipbuilding Division, Litton Systems, Inc.* ASBCA No. 17717, 73-2 BCA ¶10,205 at 48,099-100, *Unisys Corp.* No policy issue allegedly subject to the privilege has been identified. *See Unisys Corp.* In the *Ingalls* case the government sought to protect its technical advisory report on the contractor's request for an equitable adjustment, an official's determination of the value of the contractor's claim, and agency audit reports. The Armed Services Board held that these documents related to factual matters in the government official's determination and therefore did not qualify for protection under the privilege and could not give rise to a chilling effect. Similarly, in *Centel Federal Systems, Inc. v. Department of the Navy*, GSBCA No. 12011-P, 93-1 BCA ¶25,534 at 127,195-96, evaluators' notes used to prepare ratings of offerors' proposals were determined not to relate to legal or policy advice, and to be discoverable. Indeed, it has been held that matters of contract administration do not rise to the level of protected advisory opinions or legal or policy recommendations. *Unisys Corp.*, 95-2 BCA ¶27,903 at 139. No policy issue allegedly subject to the privilege has been identified. *See Unisys Corp.* Whereas there might be distinctive circumstances in which this general proposition would not be true, none have been shown to exist in this case. Nothing presented by the CO to this Board validates the chilling effect argument with respect to the documents in issue.

Threshold Determination of Relevance

The CO has suggested that this Board should make a threshold determination of the relevance of the documents sought to be discovered and withheld. The premise upon which this contention is

made is that the only documents that would be relevant would be those that relate to the change order proposals which have been denied in the CO's final written decision. It appears, however, that the contract disputes in this case are wide ranging. The test in discovery is not the ultimate relevance or admissibility of any particular document or evidence at trial, but whether such document or evidence is likely to lead to the production of relevant evidence. Given the nature of the information sought, it would be inefficient and presumptuous for this Board to attempt to circumscribe the Appellant's reasonably self-interested scope of inquiry so long as it deals with aspects of the construction contract in question in its manifold aspects. The CO's suggestion, therefore, is rejected.

Attorney Client Privilege

The attorney-client privilege protects communications between an attorney and client from disclosure unless the privilege is waived by the client. Its purpose is to encourage full and frank communications between an attorney and client. The privilege applies to protect attorney-client communications if claimed under specific and well defined circumstances where an attorney-client relationship exists or is prospective for the provision of lawful professional legal advice to the client. *See Autamar IV Corp.; Mobil Oil Corp.* The Privilege Log does not indicate the circumstances under which these documents were prepared, and the entries disclose almost nothing concerning the essential character of the documents. There is no proof that the information involved was communicated for the purposes of obtaining professional legal advice or assistance. *See Mobil Oil Corp.* The Board concludes that more than the identification of the originator or the addressee as an attorney is required to bring a document under the penumbra of the attorney-client or work product privilege. The CO has a duty to provide the Board with sufficient facts to bring the documents within the scope of the privilege. In addition, the CO has not established what confidentiality has been maintained or that distribution of the documents has not effected a waiver of the privilege. *See Autamar IV Corp.* Thus, the CO has not satisfied his burden of proving the applicability of the attorney-client privilege to the documents cited. Likewise, there is insufficient information of record to establish a basis for attachment of the work product privilege to the single document cited.

It follows that the CO has not satisfied the procedural requisites that would justify the invocation of the deliberative process privilege, either in general or with respect to any particular documents or category of documents involved in this case. Since the procedural requirements for invocation of the privilege have not been satisfied, this Board need not decide whether the substantive criteria for proper invocation of the deliberative process privilege have been met. The CO has not justified withholding the documents identified in the Privilege Log as supplemented, and so the documents withheld should be released in their entirety for Appellant's examination and copying. *See Mobil Oil Corp.*

Appellant has sought additional relief because certain documents were not available for examination at the times counsel had agreed that they could be examined and copied. The practical remedy is for the CO to photocopy the documents sought and forward them to Appellant's counsel at the CO's expense. This procedure will satisfy Appellant's need to examine the documents to

determine if they have relevance to its case, and would provide the copies it would need to introduce into evidence to the extent appropriate in the future.

ORDER

Appellant's Motion To Compel Production of Documents is granted; the Contracting Officer's opposition is overruled. The Contracting Officer shall cause all documents not produced for inspection and copying in accordance with Appellant's request when Appellant's counsel was previously available for the purpose of inspection and copying to be copied and forwarded to Appellant's counsel within thirty days, except to the extent as the parties may otherwise agree.

EDWARD TERHUNE MILLER
Member, Board of Contract Appeals